Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

ROY H. LUBIT,

*Petitioner,*

*v.*

ELANA B. LUBIT,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the New York State procedure used to determine contested custody issues in matrimonial litigation is compatible with the Due Process Clause of the United States Constitution.

2. Whether the federal constitutional protections afforded to parents when the state seeks to terminate parental rights for neglect or abuse, as recognized in *Santosky v. Kramer*, 454 U.S. 745 (1982), are applicable to proceedings in which the state, through its court system, seeks to truncate parental rights.

3. Whether New York State's procedures used to determine contested custody issues in matrimonial issues, as applied in the litigation underlying this Petition, violated petitioner's rights to due process under the United States Constitution.

4. Whether New York State's legal standard of a preponderance of the evidence in determining contested custody issues in matrimonial litigation is a sufficiently high standard to meet the due process requirements of the United States Constitution.

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## OPINIONS BELOW

The published opinion of the Supreme Court, Appellate Division, First Department, dated September 24, 2009, is set forth as Appendix A. The unpublished decision and order of the Supreme Court of the County of New York, dated June 15, 2007 is set forth as Appendix B.

## STATEMENT OF JURISDICTION

The Court of Appeals of New York denied a timely leave to appeal on January 14, 2010. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## INTRODUCTION

This is a Petition for a writ of certiorari to the Appellate Division of New York State. The issues presented here involve New York State's processes used to determine contested custody issues in matrimonial litigation, both as they exist and as they were applied in the case out of which this application arose. While it is true that the there is an exception for domestic relations cases from the normal rules of federal jurisdiction, *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), that exception is not an absolute one. This is not a case in which this Court's review would be barred by the domestic relations exception to federal court jurisdiction. This case does not seek to have this Court determine the ultimate issue of child custody. Instead, it seeks to have the procedures used here examined in light of federal constitutional due process requirements.

In essence, the petitioner is requesting that this Court extend the holdings of *Santosky v. Kramer*, 454 U.S. 745 (1982), and *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2001), which struck down New York statutes concerning termination of parental rights for neglect or abuse, to cover the marked, and generally permanent, truncation of one of the parent's parental rights (almost always the father) which the state needlessly engages in when custody contests occur.

## REASONS FOR GRANTING THE PETITION

It is beyond dispute that the relationship between a parent and child is a constitutionally-protected one. As this Court wrote in *Lehr v. Robinson*, 463 U.S. 248, 256 (1983):

> The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.

Due process, in turn, requires that any attempt by the state to abridge or redefine parental rights be carried out in a process that permits "full and fair adjudication" of the issues involved. *American Airlines v. Block*, 905 F. 2d 12, 14 (2nd Cir. 1990). In the absence of such a process, the federal courts, including this Court, have the power and the duty to require the states to afford those who would be affected by their actions due process protections commensurate with the

importance of the right protected. As will be discussed substantive due process was seriously violated in this case in multiple ways.

Although the decision of a trial court in a child custody case involves the reshaping of a family and the intrusion of the state through its court system into a protected liberty interest, New York sets no objective standards for how its courts are to address these decisions. The sole criterion set is "the best interests of the children", a phrase so vague as to be meaningless, a standard that is pliable to any inclination that the trial judge might feel, but is at the same time opaque to appellate review or any other kind of objective scrutiny, since the trial judge need only recite the formula followed by a series of after-the-fact rationales to justify its determinations.

In a different, but analogous context, this Court has analyzed statutes subjecting behavior to criminal sanctions using the vagueness doctrine. This analysis proceeds from Due Process principles and holds that criminal statutes offend the Constitution when a person of ordinary intelligence cannot take from them fair notice of what is prohibited or are so generalized and formulaic that law enforcement authorities have free reign to decide what is or is not prohibited conduct, a situation that enables, if not encourages, discriminatory conduct. *United States v. Williams*, 553 U.S. 285, 304 (2008). Such laws leave the populace at the mercy of the impulses of the person in charge, rather than subject to objective principles.

The same constitutional defects plague the New York contested custody legal process. There are no objective criteria that any person can find governing the truncation of parental rights in a custody battle. There is nothing that any would-be custodial parent can do or refrain from doing that will bring him or her into conformity with what is expected of such a person. There are no adequate rules or guidelines that appellate courts can apply on a systematic and consistent basis to review trial court determinations of custody. Instead, the custody jurisprudence of New York State is a wilderness of after-the-fact evaluations of conduct and status, arbitrary decisions, and unguided applications of subjective and unarticulated rules by trial courts.

Due process requires more than the recitation of a formula to take away a fundamental right. Due process requires a meaningful hearing in which the role of bias is minimized as well as a considered analysis of the right being addressed and the basis upon which it is sought to be limited or abrogated entirely.

In this case, father's parental rights were substantially, as well as essentially permanently and unnecessarily truncated by the application of vague and unarticulated criteria, through a process that was governed by bias rather than objective assessment of the facts. As will be argued, the system was so poorly constructed that bias was all but inevitable. Although being found to be fit to be the primary parent, Father has now lost all decision-making rights for his children and mother (who had made it clear she wished his time with the children cut to the minimal amount possible) was given the power to bar father from seeing his

children for most of the week and have babysitters care for the children during times when father had traditionally taken care of them. The trial process markedly violated substantive due process requirements: bias dominated the decision making process, the standard of proof used to justify violation of parental rights was too low, and there were no established guidelines on how to behave as a parent in order to retain his joint custody interest and ability to see the children whenever they are not with their mother or in school. Due process demands clarity, avoidance of biased processes, and an appropriate standard of proof, when citizens' liberty is at risk of being taken away by government, whether it is liberty of control over one's behavior as in law enforcement or the liberty interest in parenthood, as in this case.

In intact families our courts do not undermine parental rights to make decisions for children and to spend time with their children when they are not in school, unless the parents have been found to be negligent or abusive. No judge would force parents to place a child with a babysitter, barring the parents from being with the child for part of the week, saying that the babysitter can provide a useful experience for the child. We even let parent's home school their children although there is clear and convincing evidence that almost all children are better off being educated in established institutions with trained teachers and given an opportunity to be with peers and learn socialization skills. We do not require parents to prove that homeschooling is in the best interests of their children. Rather, we only require parents to show they are meeting minimal educational requirements. It is an

anathema to our way of life for the courts to truncate parental rights unless there is an extremely compelling reason such as child abuse.

Judges should not be empowered to curtail parental rights based on their best guess of what is best for the child. Rather, a judge should be required to opine that there is clear and convincing evidence that a situation is seriously harmful to a child before parental rights are avoidably truncated. Moreover, there should be sound scientific reasons for asserting that this is the case. Pet theories and guesses are not an adequate basis to opine that a situation is not good for a child. It takes two psychiatrists opining that someone is a serious danger to himself or others based on mental illness to temporarily force hospitalization. Similarly, when there is no finding of neglect or abuse, no judge should be allowed to truncate parental rights unless two independent forensic evaluators opine that there is clear and convincing evidence that a situation is seriously harmful to a child.

Multiple Supreme Court rulings have underscored the marked importance of parental rights and that state actions limiting them generally require a higher standard than a preponderance of the evidence. Moreover, there is a burden on the state to prove harm is being done, rather than simply saying what is best for the child.

In *Santosky v. Kramer*, 454 U.S. 745 (1982) the United States Supreme Court opined that "The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not

evaporate simply because they have not been model parents." The court also went on to say in this case that it is "plain beyond the need for multiple citation" that a natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children'" is an interest far more precious than any property. [455 U.S. 745, 759] *Santosky v. Kramer*, 455 U.S. 745 (1982) struck down the NY State statute permitting permanent termination of a parent's interest in the care, custody and management of her child based on "a fair preponderance of the evidence" because it deprives the parent of a fundamental liberty interest without due process of law, in violation of the Fourteenth Amendment to the U.S. Constitution. The rationale was that the risk of error from using a preponderance standard is substantial and that the proceedings are vulnerable to cultural or class bias because they employ imprecise substantive standards that leave determinations open to the subjective values of the judge.

New York State permitting judges to markedly truncate parental rights based upon the judge's assessment of the best interests of the child violates the spirit of *Santosky v. Kramer*, 454 U.S. 745 (1982). Custody decisions which markedly curtail parental rights are also essentially permanent. It is very rare that custody changes. Moreover, time with our young children is particularly precious and once lost it can never be regained. Therefore, the United State's Supreme Court's wisdom in *Santosky v. Kramer*, 454 U.S. 745 (1982) that termination of parental rights requires a higher standard than a mere preponderance of the evidence should apply to custody cases as well as to termination of parental rights. The fact that a parent's

parental rights are not being totally terminated in custody decisions does not permit the court to do so without powerful reason. An individual has a right to constitutional protections to a fair trial whether the ultimate punishment is life imprisonment or home confinement for a few months. Any violation of rights, whether permanent or not, whether partial or total, is protected by the Fourteenth Amendments substantive due process guarantees.

*In re Winship*, 397 U.S. 358, 370 (1970) Harlan, J., (concurring) wrote that Addington (*Addington v. Texas*, 441 U.S. 418 (1979) teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. The U.S. Supreme Court has mandated an intermediate standard of proof — "clear and convincing evidence" — when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money."

Removing children temporarily from a parent's care for alleged abuse only requires a preponderance of the evidence because it would be dangerous to children to set the bar too high before you can step in and protect a child from abuse. Moreover, the action is reversible and in fact the state has a requirement to assist the parent so that their full rights will be returned. In custody cases where no abuse is being alleged, there is no need to keep the bar low because the child is not in serious danger if he or she continues to spend time with

a parent who may not be optimal but is not abusive. Therefore, clear and convincing evidence that it is significantly harmful to the children should be the minimal standard for custody decisions interfering with a parent's right to see the child when the other parent is not with the child and for taking away decision-making rights. Moreover, the burden of proof should be on the state to show that it is harmful to the child when curtailing parental rights. It should not be sufficient for the state (a single judge) to opine that it is simply better for the child.

In New York the bar for removing parental rights in custody cases is even lower than in abuse cases since in abuse cases a judge must opine that the preponderance of the evidence shows abuse to temporarily suspend parental rights while in custody cases the court simply needs to opine that it is better for the child to do so. Moreover, in abuse cases the state acts to help parents to fix whatever problems led to a truncation of their rights. In stark contrast, in custody cases the court makes it extremely difficult to effect a change in the court order and regain rights truncated by the initial order.

The fact that other states and jurisdictions do not truncate parental rights in custody cases as New York State does demonstrates that there is no compelling state interest being protected by New York's practice. Therefore, the practice violates *Nicholson v. Williams*. In *Nicholson v. Williams*, the court held that the state is precluded from any infringement on fundamental rights unless such infringement is narrowly tailored to serve a compelling state interest. *Nicholson v.*

*Williams*, 203 F.Supp.2d 153 (E.D.N.Y. 2001). Moreover, procedural due process requires the government to abide by certain rules when it intrudes upon fundamental rights. *Nicholson v. Williams*, *supra* 285. In California the almost universal outcome of custody battles is joint custody with an arbitrator, rather than sole custody to one parent. Moreover, equal time sharing is very common in some locations. In addition, a right of first refusal to be with the child whenever the other parent is not available is standard in many locations. Therefore, there is no compelling state interest that permits the New York State to give sole custody to one parent cutting the other parent out of decision-making, and to deny a parent a right of first refusal to be with the children with the custodial parent is busy based simply upon a single judge's assessment of the best interests of the child.

The Supreme Court has also ruled that a higher standard than a preponderance of the evidence is needed to make a determination which would be stigmatizing to an individual. Because I am a forensic child psychiatrist, the appellate court's statement that I am overprotective of the children's physical safety and that this is a serious weakness in my parenting (published online for all to see) is stigmatizing and highly destructive to my career and ability to support my children. As I will describe in greater detail below, it was unfair to opine that I have a serious weakness in my parental judgment in that I am seriously overprotective of my children's safety based on contested allegations of my attitudes on safety when the children were toddlers and infants (years before the custody battle began) given the uncontested testimony

during the trial that I take the children skiing, iceskating, horsebackriding, rock climbing, swimming and to water parks.

The problems in the handling of the case of "*Lubit v. Lubit*" by the state of New York goes beyond using the wrong standard for the marked and essentially permanent truncation of a father's parental rights, and the lack of appropriate guidelines in making such a determination. The Manhattan courts handling of custody issues so violates both the normal rules for trials and what social science theory tells us is necessary for good decision-making that decisions are generally capricious and arbitrary. Substantive due produces is regularly violated. Moreover, there is generally a marked bias for mothers violating equal protection under the law. Mothers almost never get less than 50-50 time, no matter how poor the forensic evaluation was for them. Fathers generally get less than 50-50 time no matter how capable they are as parents.

In the next section I will describe the process in New York and how it violates the requirements for substantive due process such that decisions are generally capricious and arbitrary. I will then show that this occurred in my case. It is necessary to tediously describe many of the issues in my case in order to show that neither the judge's, nor the appellate court's assessments of the facts were based on a reasonable assessment of either the available facts or of the facts in evidence, and that a preexisting opinion about what the final outcome of the case should be led to markedly biased gathering, vetting and interpretation of the available evidence by the forensic evaluator and the

court. This violated substantive due process guarantees. The appellate court then rubber stamped the judge's decision.

### New York State Custody Decision Procedures

The right to trial by jury, by jurors screened for bias and protected from potentially biasing information, is crucial to justice. When it comes to family matters, however, decisions are made by judges (who act as both judge and jury) who are neither screened for preexisting bias nor protected from potentially biasing information. In fact, in family court matters judges are regularly exposed to highly biasing material including the opinion of the law guardian and forensic evaluator which are, in turn, based on hearsay, pet theories and their personal like or dislike for one of the parents. Further complicating matters, judges rely heavily on their observation of demeanor to assess the parents' credibility although research clearly shows that this method is totally unreliable. Reliance on demeanor means judges will believe the people who they find more likeable or more sympathetic based on their own personal likes and dislikes and their feelings about their own mother and father. Relying on demeanor, rather than rigorous analysis of the available data, turns custody battles into popularity contests rather than a process that is likely to elucidate what is in the best interests of the children. Altogether, the failure to adhere to precautions against bias which are seen as crucial in criminal and other civil courts, markedly interferes with appropriate and fair weighing of evidence such that outcomes are determined largely by

first impressions, momentum, and charisma, along with the pet theories of the law guardian, forensic evaluator and judge.

A further problem is that judicial decision-making is neither scientifically based nor grounded in objective guidelines created by state legislatures. Rather, a judge who lacks training in child development and who is selected for political reasons rather than his good judgment concerning children's needs, makes decisions based on personal, pet theories. Some judges favor equal time sharing after a divorce while others favor the children being predominantly in one home even if that means replacing parent time with babysitter time. One judge will focus on the child's attachment and parental warmth and patience while another will focus on which parent provides more structure. One judge will want to hear from the children how their two parents treat them and what they wish the time sharing to be, another will refuse to meet with the children. Whose courtroom you are is far more important in determining the outcome of your case than the merits of your position or the current state of scientific knowledge about children.

The combination of a system which allows judges to markedly reduce the role of a parent in a child's life for no reason other than a single judge believes it is more likely than not better for the child, along with the system being so poorly designed that it is very unlikely to be able to reliably determine what is in the child's best interests, is a disaster for our children, for ourselves and for the fundamental tenets of our nation. Markedly deepening the problem, the appellate courts are loathe

to overturn decisions using the excuse that the trial level judge, having watched the demeanor of the parties, knows best (contrary to the findings of scientific research). Moreover, applications for changes in custody based on a change in circumstances (such as the children are doing poorly because the judge got it wrong) go back to the same judge who is loathe to admit he or she got it wrong and is highly motivated to opine that the minority parent is lying and convinced the children to lie.

When people and systems wield great power with the possibility of doing great harm it is crucial that they be as well screened and trained as possible, that they follow the best scientific knowledge available and that there is careful oversight, with those who do a poor job being placed in a different job. Would we allow anyone to practice surgery without training, oversight or risk of sanctions? If not, then why are we allowing judges to engage in parentectomies without these precautions.

The simplest and most powerful solution to most custody battles, and one that is consistent with the current state of scientific knowledge, is to generally divide the time between the parents equally unless one of the parents truly has serious problems parenting, or is unavailable to personally care for the child half of the time. If equal time sharing was the expected conclusion of custody battles unless one parent is unfit or unavailable, there would be far fewer battles. This would not only save immense resources now squandered by parents and the courts, but it would serve to avoid the polarization and amplification of struggles which now occurs.

If this solution is not accepted then there at least needs to be appropriate training and selection of judges, an end to the use of pet theories and speculation, changes in the system so that judges are not subjected to biasing information, real oversight by the appellate division, and clearer guidelines on evidentiary issues and on how to weigh various factors.

It is incredibly dangerous to have a system that can interfere in our relationships with our children based on the court's impression of the best interests of the child when the system is not designed to have a reasonable chance of coming to a determination of what is in the child's best interests.

### Case of *Lubit v. Lubit*

I apologize for the tedious review of the case which follows. It is critical, however, that I provide it in order to show that substantive due process was violated and that decisions on the facts were pretextual and governed by the bias which entered the process as a result of the absence of safeguards which exist in criminal and non family court civil cases.

Elana Lubit and Roy Lubit ("the parties") were married on September 8, 1996 in Maryland. During the course of their marriage, they had three daughters: Rina, born November 6, 1998; Talya, born May 31, 2000; and Lia born June 13, 2002. Plaintiff Elana Lubit (hereafter "Plaintiff" or "Mother") commenced this action for divorce in September, 2004 against Defendant Roy Lubit (hereafter "Defendant" or "Father"). Testimony was uncontested that at the time litigation

began father was the primary hands on parent and that father was the only parent who was available to actually be with the children most of the time. Father left his career in academia so that he could himself take care of the children rather than relying on babysitters. He offered 50-50 time visitation to avoid a protracted custody battle. Mother is an anesthesiologist who leaves home three days a week before the children wake up. She demanded to be the primary custodial parent and made serious accusations about father's mental health and fitness as a parent.

A forensic evaluator, Larry Cohen, was appointed. On the eve of trial he finally produced his CV and it was discovered that he had failed to report an important connection he had to mother's lawyer. Moreover, multiple collaterals reported he had markedly misrepresented what they had said to him. The judge ordered a new forensic evaluation be performed and that the new evaluator not read or review Dr. Cohen's report. The judge and law guardian had already read the report and their opinions of the parents and beliefs concerning what the ultimate outcome of the case should be were markedly affected by this. The law guardian, embarrassed by having failed to check the CV showing Dr. Cohen's close connection to mother's lawyer, and wanting to show that it had not caused a real problem in the report produced, successfully pressed for the appointment of a forensic evaluator known to be extremely pro mother, although father's lawyer vigorously opposed the appointment of this particular evaluator.

The new forensic evaluator, Dr. Kaplan, opined that both parents were fit to render custody. He rejected mother's attacks on father that he was severely mentally ill and insidiously destructive to the children. Dr. Kaplan also said that it was not important whether the time sharing was 50-50 or 40-60 or 60-40. Dr. Kaplan opined that the children were doing well under the current 50-50 time sharing arrangement. Nevertheless, the court chose to markedly truncate father's parental rights.

Overall, Dr. Kaplan's report was markedly biased in mother's favor in that it covered over problems in mother's psychological testing and behavior that should have led to a conclusion that father was the stronger parent. For example, Dr. Kaplan said that the psychological testing done by Dr. Gensler showed mother had good traits for parenting in that she was not narcissistic or paranoid and that father had poor traits for parenting in that he was compulsive. Father's lawyers were only permitted to review the actual report by Dr. Gensler after the trial began and never received the underlying test data which they had requested. Reading of Dr. Gensler's actual report showed that he did not say that father was compulsive, as Dr. Kaplan claimed. Moreover, the psychological testing by Dr. Genssler actual stated that mother was unaware of her own anger, had difficulty with anyone confronting her, had problems with envy and jealousy and could easily imagine taking revenge if she did not get what she wanted, had a snide attitude toward men, was overconfident to the point of being mildly self centered although it did not seem to rise to the level of narcissism, and that mother acted as

if she were entitled to determine the boundaries of appropriate behavior and that if someone disagreed with her there would likely be conflict.

There were other very serious problems with the forensic evaluation done by Dr. Kaplan. Dr. Kaplan, although being ordered to neither read nor review Dr. Cohen's report asked the parents about it, was told by mother it highly favored her, and referenced it 23 times when he wrote his report. Dr. Kaplan allowed mother to speak in Hebrew throughout his observation of mother and the children although he does not speak that language. Dr. Kaplan failed to ask the children's therapists key questions about the parents, did not speak to the school teachers (although he spent six months to do his report), and failed to present father with mother's accusations so father could defend himself. He ignored the reports that the youngest child was very upset when she woke up with babysitters at Mother's house and that the oldest child was burdened by having to take care of her younger sisters when they woke up with babysitters instead of a parent. *(Tr 760)* Dr. Kaplan, when explaining a key opinion that father was more intellectual with the children and mother related in a more natural way, got his facts backwards. He testified that Rina said to Mother she liked to float on the Dead Sea, when he observed her with her mother. *(Tr 271)* In his report, however, Dr. Kaplan wrote that Rina stated that it was during his observation of Rina and her father that she said this. The full quote was that Rina's favorite thing was to float in the Dead Sea in her Daddy's arms. It appears that Dr. Kaplan was so taken by mother's false allegations that father was overly intellectual with the children that he could not

remember with whom Rina made her comments. Dr. Kaplan ignored reasons for concern about some of mother's parenting behavior. For example, when directly asked, Dr. Kaplan said that a parent lying and getting into power struggles around eating are very problematic, but he ignored substantial evidence that these were problems for Mother, including emails of mother's that he was shown. *(Tr 201-202)* When shown an email by mother acknowledging that Rina's hand had markedly swollen when mother had tightly tied a sock onto Rina's hand so that she would not suck her thumb, Dr. Kaplan wrote on the email that mother had terrible judgment. This was, however, never presented to the court by Dr. Kaplan. Instead, Dr. Kaplan said father was too critical of mother, which was in stark contradiction to the facts at hand which were that mother said father was unfit, mentally ill and insidiously destructive to the children and that the children's problems were the result of their spending too much time with their father, while father said mother was a fit parent (although at times careless and angry) and he wanted to continue the 50-50 time sharing.

The judge's marked bias for mother, understandable given that she had read two forensic reports favorable to mother before the trial began, was readily apparent. The judge ignored the serious problems with Dr. Kaplan's evaluation and accepted his conclusion that mother was essentially a perfect parent and a better parent than father, and his statement that the children would be better off being primarily in mother's care.

In the judge's decision, issues for which there was solid evidence, and issues which are normally seen as

being very important and which markedly supported father (availability to be with the children, mother incorrectly seeing father as insidiously destructive to the children and wanting to marginalize him, and the psychological testing markedly favoring father) were basically ignored. At the same time, issues which were very unclear, and which are normally seen as very secondary (overprotectiveness of the children's safety) were moved to center stage. Information contradicting the allegations was never even mentioned.

The judge had been so affected before the trial even began by the conclusions of the two forensic reports, that she repeatedly precluded evidence that was critical of mother while letting in all evidence mother presented against father, including the testimony of man who called mother up and volunteered to testify after father filed a law suit against him to have his bill paid. The judge made a number of criticisms of father's parenting while finding no problems with mother's actions. Careful review of the evidence underlying the judge's finding of the facts criticizing father shows that her findings on the facts were neither fair nor reasonable. The judge criticized father for allegedly saying that he would look to the children for guidance on major issues and let them decide whether they would continue in their current school. This is not what father said and not what is in the transcript of his testimony. When the Court asked father if he would make a change in schools because of his child's wishes he said "there are things that a child could tell me that would lead me to seriously consider changing a school," but "They don't make the decision on schools. Elana and I make the decision on schools." *(Tr 1026, 1027)* The judge claimed there was no

indication the children suffered from the use of babysitters. In fact, there was testimony that the children had a very hard time when they woke up with sitters. The judge claimed that father encouraged the children in things he was interested in but fails to explore their interests. The basis was the speculation of the forensic evaluator (who was shown to be totally unreliable) stating that the oldest child was overly intellectual with father in order to please father. As noted above, in trying to describe how he observed the oldest child being less intellectual with mother he got his facts backwards. Another forensic evaluator hearing that the children asked father questions could easily have praised father for stimulating their interest in learning.

Some of the judge's criticizes of father are inconsistent with other criticisms of father. On the one hand the judge said father is only interested in what he cares about and is not interested in the children's wishes. On the other hand she criticized father for saying he would let the children decide things they should not decide.

The judge's statement of fact that father conveyed his negative opinion of mother to the children and professionals, and her failure to criticize mother for doing this, was grossly unfair. The judge criticized father for disparaging mother in front of Rina during a medical visit and cites the medical records as proof. Review of the records, however, shows that this is not what the records state. The judge apparently accepted mother's lawyers' claim concerning what was in the records rather than actually reviewing the record herself. While finding

serious fault with father for criticizing mother, based on a misstatement of what was in the medical record, the judge ignored or blocked evidence of mother being inappropriately critical of father. Father wanted to call a psychologist the oldest child had seen stating that he would testify that mother said terrible things about father. Mother claimed confidentiality and the judge said that it did not matter what mother had said several years earlier, it only matters what mother was saying now. (It is puzzling the judge felt that when judging mother it was only important what mother said now but when judging father she was very concerned about father's alleged overprotectiveness when the children were toddlers and infants, years before the litigation began.) When father's lawyer tried to ask mother about her disparaging father to parents of the children's friends mother claimed the person she was asked about was a personal friend; the judge ruled that mother did not have to say what she said to a personal friend. Mother never denied making negative comment to this person and never denied the person is a parent of the children's friends. The judge did not mention in her judgment that there was sworn testimony by Joel Haggin, father of friends of the children, that mother called him up a couple of days before he was scheduled to testify saying father is crazy and a liar. The forensic evaluator had failed to look into father's reports that mother said terrible things to the children about father and the court ignored father's reports that mother had said horrible things about him to the children.

The judge criticized father for undercutting mother concerning the oldest child's asthma treatment,

accepting mother's statement of an incident, although the medical record clearly contradicted mother's statements and supported father. Most serious of all, the judge criticized father for being overly protective of the children's safety based almost entirely on mother's contested allegations of his having allegedly had excessive safety rules when the children were toddlers and infants years before the litigation began. The judge ignored father's uncontested testimony that in recent years he had taken the children skiing, horseback riding, rock climbing, swimming, supported their being in gymnastics and took them to giant water parks.

Claiming father caused the oldest child to suffer from anxiety, the judge both misquoted the forensic and ignored key evidence that the oldest child suffers from anxiety when with her mother, not when with her father. Specifically, mother noted that the oldest child had gone to the ER on five occasions for symptoms with no organic pathology found. All five visits occurred from mother's house.

The judge's bias was also evident in a statement she made in chambers that father must have been a bastard for mother to hate him so much.

Finally, even if the judge had been correct in her fact finding, it makes little sense to take children who are doing well with a 50-50 time division away from a fit parent and place them with babysitters when the forensic evaluator said it did not really matter if the children were 50-50, 40-60 or 60-40. The judge followed the forensic's suggestion that the children would be

better off primarily in one house since the parents had different parenting styles since this allegedly created confusion for them. However, doing this replaced father time with babysitter time thereby increasing the number of caretakers the children had. The judge's imposed cure actually made the problem worse.

Father appealed. The appellate division rejected father's appeal. The appellate court's statements, however, showed that they served as a rubber stamp for the judge rather than actually reviewing the material. Essentially every statement they made was completely unsupported by the evidence. The appellate division claimed mother was the primary parent when the custody battle began. No one had said that, it was contrary to the evidence presented, and it was not what the judge had even said. The judge had said mother was the primary parent until a year before problems began. The difference is important since the standard is who is the primary parent when litigation begins. The appellate court changed the facts to fit what the law required rather than applying the facts to the law. In reality, father had always been the primary hands on parent as was readily apparent given the parents' work schedules. The court claimed father had caused the children to go back and forth between the houses on a daily basis for months and therefore had poor judgment. No one testified this happened and it never happened. The court said that father had serious weaknesses in parenting in that he was overly protective of the children's physical safety. In doing this it accepted the judge's focus on issues of soy versus peanut butter and the use of forks by toddlers, and discussion about whether the mattress should be on the ground for an

infant who had repeatedly fallen from the bed, issues that all agreed were from years before the custody battle, and ignored the uncontested testimony that father was currently taking the children skiing, ice skating, horseback riding, rock climbing and swimming. Even if father had been overprotective when the children were toddlers, the evidence was clear that he was no longer overprotective. In response to the crucial issues of mother saying horrible false things about father, clearly seeking to minimize his role in the children's lives and it being established law that parents are better than babysitters the appellate division simply said the "other issues" raised had no merit. The appellate court has repeatedly found such issues to be determinative of custody cases and has overturned lower court decisions when these factors were not taken into consideration. It appears that the appellate court wished to uphold the judge's decision and made findings on the facts to support the predetermined judgment. Leave was asked to appeal to the Court of Appeals and was denied.

Perhaps the most powerful example that the system has not fairly judged the facts and instead is controlled by bias is that when the children began doing very poorly after the schedule changed, when they reported to their lawyer that their mother had threatened them to not talk about problems at her house lest they never see her again, when the oldest child's therapist wrote that the oldest child was suicidal at mother's house and only at mother's house, when the oldest child was hospitalized for suicidality after begging her lawyer for help and being rejected, when a babysitter sent a sworn affidavit stating that the middle child reported being

seriously mistreated at mother's house, the response of the system was that the children's lawyer kept the information to herself for a year and then claimed that all three children were all lying, and the judge refused to meet with the children or to get a new forensic evaluator to look into the situation.

Due process was not afforded in this case. Instead, the petitioner was subjected to a capricious and arbitrary decision making process in which bias, rather than a fair weighing of the evidence, was the key factor in coming to a determination of the facts. The petitioner was subject to a system that used an inappropriate standard in deciding to markedly interfere with his rights to be with his children and to have a say in their management and (more importantly) their right to his presence, protection and guidance. The petitioner was subject to a system which is widely known to markedly favor mothers and therefore violates equal protection under the law. Other states deal very differently, and avoid truncating parental rights. This determination is offensive to the United States Constitution and should be set aside by this Court.

A great deal is at stake in this case, the well-being of three children, whether we live in a system that truly seeks justice as opposed to simply the impression of justice, and the well-being of many other children who have been subject to similar and even worse miscarriages of justice. There is a desperate need for the federal government to protect the substantive due process rights of parents, and in so doing protect the welfare of children.

## CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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## APPENDIX A — OPINION OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, NEW YORK DATED SEPTEMBER 24, 2009

## SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

ELANA B. LUBIT,

Plaintiff-Respondent,

v.

ROY H. LUBIT,

Defendant-Appellant.

Sept. 24, 2009.

FRIEDMAN, J.P., SWEENY, CATTERSON, RENWICK, FREEDMAN, JJ.

Judgment, Supreme Court, New York County (Saralee Evans, J.), entered September 19, 2007, after a non-jury trial, which, to the extent appealed from, as limited by the briefs, granted plaintiff custody of the parties' children and denied defendant's request for joint custody, unanimously affirmed, without costs.

*Appendix A*

The court's determination awarding custody to the mother with liberal visitation privileges to the father was based on a thoughtful assessment of the testimony of the parties and the court-appointed forensic expert, and has a sound and substantial basis in the record (*see Eschbach v. Eschbach*, 56 N.Y.2d 167, 436 N.E.2d 1260, 451 N.Y.S.2d 658 [1982]; *cf. Mohen v. Mohen*, 53 AD3d 471, 862 N.Y.S.2d 75 [2008], *lv. denied* 11 N.Y.3d 710, 900 N.E.2d 555, 872 N.Y.S.2d 72 [2008]; *Matter of Rebecca B.*, 204 AD2d 57, 611 N.Y.S.2d 831 [1994], *lv. denied* 84 N.Y.2d 808, 645 N.E.2d 1217, 621 N.Y.S.2d 517 [1994]). The evidence demonstrates that the acrimony and mistrust that marks the parties' relationship makes joint custody a nonviable option (*see Braiman v. Braiman*, 44 N.Y.2d 584, 589-590, 378 N.E.2d 1019, 407 N.Y.S.2d 449 [1978]; *Trapp v. Trapp*, 136 AD2d 178, 181-183, 526 N.Y.S.2d 95 [1988]). An attempt at joint custody that the parties negotiated failed when appellant unreasonably insisted that the parties share custody on such a strictly equal basis that for several months the three children, ages 2 to 8, alternated daily between their parents' residences. A detailed alternative worked out with a law guardian also failed. The parties were unable to co-parent because they were openly hostile to each other and, without drawn-out negotiations, could not reach agreement on any decisions with respect to their children, including important matters involving education, extra-curricular activities and medical care.

The court properly found that the interests of the young children will best be served by awarding sole

custody to the mother because her style of parenting is more nurturing and conducive to the children's emotional and intellectual development, and because she was the children's primary caretaker before this litigation commenced. Although the court found that the father is a loving, committed parent, it also found that his parenting skills had significant shortcomings. Among other things, the father demonstrated excessive anxiety about the children's physical well-being, and was inflexible in his response to the children's needs.

Contrary to the father's position, the testimony of the expert was admissible since the expert opinion was primarily based upon direct knowledge derived from the expert's psychiatric interviews of the parties and their children, alone and in combination (*see Balsz v. A & T Bus Co.*, 252 A.D.2d 458, 675 N.Y.S.2d 604 [1998]). To the extent that the expert's report and testimony may have incorporated inadmissible hearsay, we find that the admissible evidence in the record, including the portion of the expert's report that did not include hearsay, was sufficient to support the trial court's conclusion, and we would independently reach the same result based on the unobjectionable portions of the record. Although the court should have stricken the hearsay aspects of the expert's written report, admitting it did not constitute reversible error.

Finally, the court did not treat the law guardian as an unsworn witness by briefly referring to her opinion as to custody and her basis for it. Rather, the court appropriately took notice of the position that the law

guardian had taken as an advocate on the children's behalf (*see Bluntt v. O'Connor*, 291 A.D.2d 106, 117, 737 N.Y.S.2d 471 [2002], *lv. denied* 98 N.Y.2d 605, 773 N.E.2d 1017, 746 N.Y.S.2d 279 [2002]).

We have considered the father's additional arguments and find them without merit.

## APPENDIX B — DECISION AND ORDER OF THE SUPREME COURT OF THE COUNTY OF NEW YORK, PART 51 DATED JUNE 15, 2007

**SUPREME COURT OF THE COUNTY OF NEW YORK COUNTY OF NEW YORK: PART 51**

Index. No. 350479/04

ELANA B. LUBIT,

Plaintiff,

-against-

ROY H. LUBIT,

Defendant.

DECISION & ORDER

EVANS, SARALEE, J.:

This is a decision after trial in the divorce action commenced by Elana Lubit against Roy Lubit. Plaintiff filed a Summons and Verified Complaint on September 7, 2004. Issue was joined on October 4, 2004. Plaintiff, who initially sought a divorce on the grounds of cruel and inhuman treatment pursuant to Domestic Relations Law ("DRL") §170(1), amended her complaint after executing a stipulation stating that she would seek a divorce on the grounds of constructive abandonment pursuant to DRL § 170(2) upon submission of an affidavit without inquest. Grounds having been agreed to prior

to trial, the court commenced a trial of the remaining disputed issues on January 3, 2007, continuing January 4, 5, 8, 22 and February 5, 2007. At trial the parties were represented by counsel and their three children appeared by a law guardian.

The matters presented to the court for decision include custody of the children, parental access, child support, as well as equitable distribution of the marital residence and one brokerage account. Plaintiff also seeks economic sanctions against defendant due to his refusal to provide her with a Jewish divorce, known as a Get. All of the remaining financial issues have been resolved by the terms of a prenuptial agreement.

**The Trial**

I have had a full opportunity to consider the evidence presented at trial, including the testimony offered and the exhibits received. The witnesses at trial included each of the parties and William H. Kaplan, M.D., the court appointed forensic psychiatrist. A therapist who treated Dr. Roy Lubit, and four of Dr. Lubit's friends and colleagues of his also testified about his qualities as a parent. On rebuttal, a former client of Roy Lubit testified for plaintiff, Dr. Elana Lubit. I have had the opportunity to observe the demeanor of the various witnesses called to testify and have made determinations on issues of credibility with respect to these witnesses.

*Appendix B*

After reviewing the testimony and exhibits in evidence, I now make the following findings of fact and conclusions of law.

**Facts**

The parties were married on September 6, 1996 in a religious ceremony. They are medical doctors who each place a high premium on education and religious practice. Plaintiff is an anesthesiologist and defendant is a child and adolescent psychiatrist with a specialty in forensic psychiatry. In addition, each has an advanced degree in another field. They have three young daughters—Rina, Talya and Lia—who attend a Jewish primary school on Manhattan's West Side[1].

Both parties have arranged their work schedules to maximize the amount of time they spend with the children. Dr. Elana Lubit is on the faculty of New York University Medical Center where she works long days on Wednesday, Thursday, Friday and on alternate weekends when the children are with their father. Although she works more than forty hours each week, she is considered to be on a part time schedule because she does not work every week day. Dr. Roy Lubit does not work on the days that he is scheduled to be with the children. He has a practice dedicated to private patients and forensic assignments that allows him flexibility with

1. Rina Ariela was born November 6, 1998; Talya Adira was born May 31, 2000; and Lia Daniels was born June 13, 2002.

his schedule. Additionally, although he is not presently a paid member of a hospital faculty, he supervises residents in psychiatry one day a week at New York University Medical Center.

At the outset of litigation, the parties lived together with the children in the marital residence, a cooperative apartment located at 165 West End Avenue. Thereafter, due to the high level of tension that existed in the home, the parties entered into an agreement allowing plaintiff to move out of the marital residence without prejudice to her claims at trial. She now lives in a rental apartment at 275 West 96th Street. Defendant continues to reside in the marital residence and hopes to remain there following the conclusion of this litigation. Pursuant to an agreement which was negotiated with the assistance of the law guardian, the children spend fifty percent of their time with each parent.

Until 2003, the year prior to commencement of this action, plaintiff was the parent primarily responsible for the children. At that time, defendant assured a greater role in their daily routine, and according to plaintiff's testimony, defendant began to compete with her for the children's attention. She noted, by way of example, that defendant wanted to be with the children when plaintiff walked them to camp and when she sat down with them to do homework. On those occasions, defendant told the girls that they did not have to walk with plaintiff or do homework with her, but that they could do those activities with him. Plaintiff believed that such competitive behavior was not good for the children.

Disagreeing with plaintiff's testimony in this regard, defendant maintains that he is now the parent who is primarily responsible for taking the children to school and to their medical appointments and arranging their play dates. He notes that because of plaintiffs work schedule she often delegates those duties to baby sitters, a practice he believes is detrimental to their well being. Defendant has offered to assume the responsibility of accompanying the children at such times as plaintiff is unavailable during plaintiff's scheduled parenting time. Plaintiff has declined his offer, stating that the children need definite boundaries that govern their schedule with each parent.

Because the parties have substantially different parenting styles, every decision related to the children is disputed. Every dispute, however minor, results in endless emails and complicated negotiations. Moreover, throughout this litigation every difference of opinion regarding the children has required the intercession of a third party for it to be resolved. The parents rely on the law guardian for assistance with schedules, safety issues, emergencies, camp, after school activities and medical treatment. Plaintiff testified to her belief that the parties had agreed to continue to send their children to Beit Rabban where they presently attend school, and to maintain their historic religious practice. Defendant testified that he did not necessarily agree with her understanding on those issues but did not state his present preferences regarding school or religious practice. Although the parties disagree about custody, they both suggest that a parent coordinator be

appointed by the court to help them to make decisions about the children.

Some of the greatest conflicts between the parents have involved Rina, the parties' eight year old daughter. The parties disagree about Rina's health and her after school and camp attendance. Shortly after this action commenced Rina exhibited signs of experiencing an inability to walk and visual hallucinations when her father. Roy Lubit became alarmed by Rina's symptoms and conveyed his concern to plaintiff, stating that he wanted to bring Rina to a neurologist for emergent care. Plaintiff disagreed with his plan. While Elana Lubit was also troubled by Rina's behavior, she believed that the girl was pretending to see things in order to get attention from her father. Plaintiff attributed her skepticism about the claimed impairment to the calm manner in which Rina relayed her symptoms, and then immediately explained that they were called hallucinations. According to plaintiff, Rina only experienced the symptoms in her father's presence. In the end, the symptoms abated soon after Rita began to see a psychologist. She continues to be treated by the psychologist for stress related to her parents' divorce.

Plaintiff also testified that defendant attempts to trade off one child's interest for another's in order to get his way. One specific instance she related involved defendant's desire to place Rina in an after school chess club during plaintiff's parenting time. When plaintiff objected that Rina was over programed and needed some "down, time," defendant refused to allow Lia to

be enrolled in an extended pre-school program unless plaintiff relented and agreed to permit Rina to attend chess club. Defendant failed to consider that the older children had attended the extended pre-school program or that Lia's attendance in it was supported by her teachers as well as plaintiff.

Another area of contention between the parties concerns plaintiff's treatment of Rina's respiratory ailments. Plaintiff, an anesthesiologist who regularly treats patients who manifest breathing difficulties, testified that Rina has mildly reactive airways, a condition that exacerbates the symptoms of a respiratory infection. She maintains a cautious, but low key approach to treating Rina. Defendant, who is more anxious about Rina's illnesses nas, on occasion, undermined plaintiff's treatment plan by advising Rina to take medicine that plaintiff concluded was not indicated, and has called Rina's pediatrician seeking her intervention more than once. On August 23, 2005, defendant brought Rina to her pediatrician with a complaint of wheezing that proved to be unremarkable. During the visit he disparaged plaintiff's treatment of Rina in front of the child, causing the doctor to ask Rina to leave the room, to discuss her condition with defendant out of the child's presence, and to note in Rina's medical chart that defendant's behavior was inappropriate. (Exhibits "G" and "H").

Asserting that defendant is excessively fearful about the children's physical well being, plaintiff testified at length concerning the effect that his fears have had on

the family. His anxiety resulted in the establishment of a series of rules in the marital home that precluded, *inter alia*, use of forks by everyone (to prevent gouging an eye), eating peanut butter (to avoid food poisoning), drinking coffee (to avert burns) and leaving the door to the apartment ajar (to prevent a child from wandering off and falling down hallway stairs). The rules required the application of sun screen to ensure against cancer each time the children left their home regardless of season or the length of time they were expected to be outdoors. Defendant's fear that one of the children would fall from the parents' platform bed caused him to advocate that their mattress be placed on the carpeted floor to prevent an anticipated injury, notwithstanding that plaintiff had installed safety rails on the bed. Plaintiff testified that defendant's anxieties also caused the children, especially Lia, to develop a fear of separation which was manifested on the days that defendant brought Lia to pre-school.

While not disputing the existence of these rules, defendant explained that as the children got older they relaxed. He testified that the children are now permitted to use forks and to eat peanut butter during his parenting time. He further stated that prior to the parties' separation, after consulting with an expert, he concluded that it was unnecessary to place the marital bed on the floor to avoid a potentially serious injury to a child who rolled off the bed. He maintained that most people would agree that exposure to the sun has negative effects and that his concern is not excessive.

*Appendix B*

Throughout the course of litigation defendant has pointed to violation of some rules by plaintiff as an indication that she was a less fit parent. He expressed his position to plaintiff directly and he noted several instances of plaintiff's purported carelessness to the law guardian and to medical professionals. On one occasion, shortly after plaintiff moved into her own apartment the law guardian notified her that defendant complained that the apartment terrace was a danger to the children. A date was set for the law guardian to inspect the apartment/terrace to ensure that it was safe. On the evening before the inspection was to occur, defendant returned the children to plaintiff's new apartment after a visit, entered the apartment without invitation, walked to the terrace door and pulled on it until the safety lock on the door broke. Plaintiff arranged for a locksmith to replace the lock the following morning, the same day as the law guardian's scheduled inspection. Defendant's actions appear to have been intended to show plaintiff in a bad light.

Elana Lubit is seeking sole custody of the children. She considers a 50/50 split of parental time a poor arrangement for the children who find it confusing to shuttle back and forth between homes during the school week. She believes that they need one home base. Pursuant to a detailed proposal she set forth the children would reside primarily with her, defendant would have liberal access to the children and, with the assistance of a neutral parental coordinator, he would participate in making decisions that affect the children. In the end, if there was no agreement on a disputed issue, Elana

Lubit would make the decision. She believes that unless one parent were able to make final decisions, it would be impossible to enroll the children in schools, camp and after school activities.

Roy Lubit is seeking shared custody of the children and a continuation of the same 50/50 time sharing schedule that is temporarily in place. He maintains that he is the more available parent during the week and that he is more able to take the children to their after school activities, arrange play dates and doctors' appointments. He also notes that plaintiff leaves for work on some mornings before the children awaken and on those mornings they are cared for by a baby sitter. Defendant views this as detrimental to the children and maintains that it would be in the children's best interests for him to care for them every morning that plaintiff is unavailable, regardless of where the children sleep.

Claiming that the children are more attached to him, defendant relies on a letter written by a psychotherapist who treated him in the 1990s. The letter states that plaintiff told the therapist in 2001 (when Talya was one year old, and one year prior to Lia's birth) that the children insist on being with their father when they are upset. (Ex. P). He also notes as support for his conclusion about the children's attachment to him that during an interview with the court appointed neutral forensic in this case, Mina drew a card on which she wrote "I love Dad the best" but that she did not express similar sentiments about her mother. Defendant revealed that plaintiff talked with the children in Hebrew in his

presence, ignoring the fact that he did not understand the language and making him feel excluded. He did not explain that prior to having children the parties agreed that when they had a family it would be beneficial for children to be fluent in another language. They agreed that the mother would speak with the children in Hebrew, and perhaps the father would speak with them in French.

The father testified that if he were the custodial parent, he would look to the children for guidance when making decisions about such critical issues as which school to send them to and whether they should continue to follow the orthodox Jewish tradition. He distinguished his parenting style from plaintiff's in this regard implying that she would not place the same importance on the wishes of the children—all of whom are eight years old or younger—when making decisions about significant issues.

The law guardian, speaking for the children, opines that Elana Lubit should be awarded sole custody and that Roy Lubit should be given liberal parenting time with them. Her conclusion is based on extensive interaction with the family for a period of more than two years, the parties' trial testimony and the forensic psychiatrist's testimony. Noting defendant's tendency to try to place plaintiff in a bad light, his indecision, his over protective behavior *vis a vis* the children and his inability to separate his needs from the children's needs, the law guardian also stated that plaintiff demonstrated a "sensible and pragmatic approach that realistically

assessed what was appropriate for the children given their respective maturity and stages of development."

**Expert Testimony**

*Forensic Examiner*

The court appointed neutral psychiatrist William Kaplan, M.D. evaluated the Lubit family and testified about his observations. Dr. Kaplan, a child and adolescent psychiatrist was qualified as an expert. A report of his findings is in evidence as the Court's Exhibit I. Prior to testifying, Dr. Kaplan interviewed the parties, their children and the children's babysitter. He talked with their doctors and therapists. Because it was during the summer, he was unsuccessful in reaching the children's teachers. He reviewed reports of psychological testing previously done by Daniel Gensler, a clinical psychologist, documents submitted to him by the parties, plaintiff's diary and letters from defendant. In addition, he observed each of the parents separately interacting with the children in his office.

Dr. Kaplan is the second neutral appointed to evaluate the Lubit family[2]. The court's order of

2. After the fast forensic examiner issued his report, defendant moved to preclude his testimony due to a claimed conflict of interest. The doctor had not revealed to defendant or the court that he had recently co-authored an academic paper with plaintiff's attorney. After argument, I concluded that there was no conflict of interest, but to avoid the appearance of a conflict I appointed a second forensic who did not know either of the parties or their attorneys.

appointment instructed Dr. Kaplan not to read the prior appointee's report and not to contact him. He complied with the order.

Dr. Kaplan assessed the parties' relative parenting capacities and testified to his findings. According to the doctor's testimony he used Dr. Gensler's test results to clarify his impression of the parties' personality styles and problems, and he reviewed documents proffered by the parties and found them to be relevant. He concluded that Roy Lubit is "an extremely thoughtful, articulate, soft-spoken individual" who is "sincere about his commitment to his children." In this regard, the doctor noted that Roy Lubit rearranged his professional schedule so that he is available to meet the children's needs. Dr. Kaplan further observed that defendant ". . . has a great deal of anxiety and he has an obsessional style" (Ex. I, p. 47) which causes him to be "overly anxious" and making it difficult to move on or reach "a compromise with Elana in terns of decision-making for the children." The doctor concluded that defendant's obsessional style causes him to focus on the manner in which plaintiff interacts with the children, and he is critical of her style and the decisions she makes affecting the children.

In addition, the doctor related that Roy Lubit's "excessive concerns about the physical safety of the children" stand in the way of his working cooperatively or amicably with Elana Lubit concerning the children (Ex. I, p. 48). The doctor stated that defendant's anxiety, which is communicated to the children, causes problems

in dealing with plaintiff because the parties do not "share the same obsessional style" in dealing with the children. According to Dr. Kaplan, defendant's "obsessive parenting style" has had an adverse effect on the children, causing the older two girls to affect a "pseudo-mature style" (Ex. I, p. 49). It causes them to discuss topics that are very mature or very cognitively advanced so that they can bring pleasure to their father who takes pride in such accomplishment.

In contrast, Dr. Kaplan concluded that Elana Lubit has a more open and warmer parenting style. He observed that plaintiff is more "hands-on" with the children, that she is less intrusive and less anxious. Plaintiff told the doctor that the defendant's anxiety is conveyed to the children and has an adverse effect on them; accordingly, she does not support defendant's approach. The doctor concurred with plaintiff's concern that Rina has become overly focused on physical problems, that she exhibits somatic or physical complaints that appear to be attention seeking rather than having a physical basis. In part, Dr. Kaplan attributed Rina's complaints to her relationship with defendant and her exposure to his fears. In this regard, the doctor recited defendant's excessive concerns with exposing the children to sunlight for fear of its linkage to cancer and his fear of dangers within the apartment and outdoors during play. He explained that the difference between the parents' approach has caused situational confusion. Notwithstanding the above, based on the manner in which they played in his office and how they interacted with their parents, Dr. Kaplan

agrees with the conclusion reached by the parents and the professionals with whom he spoke, finding the children to be generally well-adjusted and high functioning.

The doctor relied, in part on the information provided to him by Jean Edwards, the children's baby sitter. Ms. Edwards, who has worked with the children for many years, had direct observation of interactions between the parties, and of their interactions with the children. The information she imparted to Dr. Kaplan assisted him in reaching his conclusions insofar as it corroborated his conclusion that the mother is the calmer and more natural parent. Ms. Edwards reported that plaintiff is more effective at discipline than the father who lacked consistency in this regard. She told Dr. Kaplan that the mother is more patient with the children and more inclined to play with them than the father.

Cross-examination of Dr. Kaplan by defendant focused on the doctor's perceived departure from guidelines established by professional organizations in his field; his failing to re-score the psychological tests administered and scored by Dr. Gensler; not being aware of the number of times a court did, or did not, follow recommendations he made in trial testimony; his decision to put certain words, phrases and sentences in bold face in his report, thereby creating an unfair impression of the parties; and, implying that the witness did not understand the interaction between plaintiff and the children because they spoke in Hebrew during his

evaluation of them, a language he does not speak. Notwithstanding defendant's prolonged attack on Dr. Kaplan's methodology, I found the doctor to be a credible witness—one whose trial testimony provided assistance to the court.

Failing to follow the specific instruction of the court that he not make recommendations on specific custodial plans, Dr. Kaplan included them in his report. Accordingly, after hearing defendant's objection to the court's receiving testimony on this point, I limited the doctor's testimony to his observations as to why the present 50/50 split of parenting time is, or is not, working for the children[3]. The doctor's response to this limited area of inquiry was that the current custodial arrangement causes the children stress. He attributed the stress, in part, to the parents' competition to be the super parent. According to Dr. Kaplan's testimony, such behavior deprives the children of normal spontaneity in their play, causes them to become self-conscious and to feel that they are obliged to gratify or please their parents. In the end, it has an adverse effect on their psychological development.

The testimony given by the other collateral witnesses was of little value to the court. Four friends

3. The report is in evidence as the Court's Exhibit I. The ultimate conclusions stated in it in violation of the court's appointment are excluded from consideration in reaching the conclusions contained in this decision.

and colleagues of defendant's testified that he is a caring and attentive father. Lori Bollinger, a therapist who treated defendant from 1994-1998, was called to testify for the purpose of relating the contents of a telephone call she had with plaintiff in 2001 when the Lubit's oldest child was not yet three years old. In lieu of hearing Dr. Bollinger's testimony about the telephone conversation, an email Ms. Bollinger wrote to Dr. Kaplan concerning the 2001 telephone call was received in evidence. In rebuttal, plaintiff offered testimony of a man for whom defendant had provided forensic assistance in a matrimonial action. Defendant is presently in litigation with the witness; consequently, his testimony is given little weight.

**Analysis**

*Custody*

Paramount to every custody decision is a determination of the best interests of the child under the totality of the circumstances. *Friederwitzer v. Friederwitzer*, 55 NY2d 89 (1982). A court's consideration of the child's best interests must contemplate what would best promote the child's welfare and happiness. *Eschbach v. Eschbach*, 56 NY2d 167 (1982). In making such a determination there are no absolutes. The court looks for guidance to a number of factors including, the quality of the home environment, the guidance that each of the parents provides for the child, the ability of a parent to provide necessary emotional and intellectual development, the financial status of the parent and the child's wishes. *Id.* at 172.

*Appendix B*

A joint custodial arrangement is preferred for parents who are relatively stable and amicable and who agree to making joint decisions. *Braiman v. Braiman*, 44 NY2d 584 (1978); *Ring v. Ring*, 15 AD3d 406 (2nd Dept. 2005). If however, the parents are incapable of exercising the degree of cooperation required for a joint parenting relationship to be successful, joint custody is to be avoided. *Bliss v. Ash*, 86 AD2d 575 (1st Dept 1982), *aff'd* 56 NY2d 995 (1982).

An analysis of each of the factors relative to deciding this issue follows:

*Quality of the Home Environment and Parental Guidance* — The parents lived together in disharmony until September, 2006 when plaintiff moved from the marital residence to a two bedroom rental apartment. Pursuant to a stipulation governing visitation *pendente lite*, the children spend fifty per cent of their time with each parent in their respective homes. Although very little evidence was adduced on this issue, it appears that both homes are physically comfortable.

Both parents are loving and attentive parents who are concerned about the children. They both provide a warm environment that places value on the children's education, religious observance and health. There is credible evidence before the court for me to conclude that the parties have significantly different parenting styles. Plaintiff-mother is more playful with the children, and while she places emphasis on education, she is less likely than defendant to use every event as an

opportunity to promote and enforce academic achievement. She is concerned about the children's physical health and safety, but does not dwell on the myriad pitfalls that a child can encounter in her home or at play. She appears to incorporate the children's needs into her routine easily.

In contrast, defendant-father exhibits anxiety about what he perceives to be the many opportunities for illness and accident in his children's lives. The record reveals that he has enforced unusual safety precautions in the marital home including, *inter alia*, banning forks for children and adult use; forbidding consumption of some foods; conveying to the children a heightened fear of the danger of exposure to the sun by inventing the concept of the "sun wolf' and requiring them to apply sun screen for even brief excursions outdoors; and advocating that the parents' bed be placed on the rug of the bedroom floor to prevent a child from falling from the bed. Defendant's anxiety appears to be a factor in the oldest child's over emphasis on somatic symptoms to get attention, and the youngest child's separation difficulty when defendant brings her to school.

The parents' current employment arrangement requires plaintiff to spend longer hours away from home than defendant, necessitating the greater use of baby sitters. There is, however, no indication that the children are negatively affected by the amount of time they are attended to by baby sitters. Schedules notwithstanding, plaintiff is the warmer and more nurturing parent. She

is more relaxed in attending to the children's needs. And she is more able to separate her needs from the needs of the children.

*Ability to Provide Emotional and Intellectual Development* — Both parents are educated, place a high value on the importance of education and are competent to provide for the children's intellectual development. Until this litigation commenced they appeared to agree to send their children to a Jewish day school through middle school. Defendant's testimony revealed for the first time that he may have changed his position. He indicated that he would allow the three children to decide whether they wished to continue in Beit Rabban, the school they currently attend. Given their ages and stages of development, this approach does not seem appropriate. Defendant further stated that he would give similar deference to the children's wishes about which branch of Judaism to follow in the future. This undue deference to the desire of children who are eight years old or younger reflects a lack of understanding of the role of a parent *vis a vis* young children. Dr. Kaplan testified. that defendant "gets stuck on issues affecting the children." In contrast, plaintiff is unequivocal about decision making and plans to continue the educational and religious path that the parties established prior to the divorce litigation.

Both parents have relied on the assistance of third persons to assist them to make decisions throughout their marriage. Implicit in their testimony is the belief that they will utilize a third person—a therapist or a

parent coordinator—to mediate when they are unable to concur on an important decision concerning the children. During this litigation there have been many instances that have required the law guardian to decide an issue that the parties could not resolve regarding the children's medical, school and camp. In the future they will not have the luxury of yielding their decision making authority to a neutral decision maker to resolve the day-to-day matters that will need to be resolved. Under these circumstances, one of the parents should have the ultimate authority to make decisions.

*Financial Status* — This is not an issue. The parties are both capable of earning an adequate living to support their children. Although the plaintiff appears to have earned slightly more money than defendant in 2005-2006, the disparity is due, in part, to defendant's voluntary decision to arrange his schedule to be at home when he is the custodial parent. Prior to commencement of litigation, defendant had a more traditional work week which afforded him the potential for greater income. The parties, who live modestly, have been able to provide for all of their children's needs and the testimony reveals that they will be able to continue to do so in the future.

*Desire of the Children* — The children love both parents and are comfortable with them. The testimony of Dr. Kaplan and the other collateral witnesses was consistent and reveals that the children are well adjusted and appear to have weathered this difficult period well, with the assistance of therapy. They appear to want to spend time with both parents.

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*Impact of Domestic Violence* — The court is mandated by statute to consider the impact of domestic violence on the children in making a custody/access determination. DRL §240(1). "[A]buse or violence perpetrated by one of the parents against the other or a child is a legitimate factor for the court to consider in making its custody determination."

Each of the parties alleged that the other committed acts of domestic violence and sought an order of protection. After conducting a hearing, I concluded that the parties were engaging in acts of incivility, but that neither committed acts of domestic violence. Accordingly, both applications were denied. The effect of domestic violence therefore plays no role in this court's custody determination.

The credible evidence establishes that the parents love their children and are committed to raising their daughters in a way to maximize their options to grow into intelligent and caring young women. It further shows that while the parties demonstrate a strong commitment to their children, the defendant has proven to be self-referential in setting goals for the children. In this regard, defendant strongly encourages achievement in the areas he values, but does not explore their needs and preferences as he professes to do. Additionally, defendant has exposed the children to his excessive anxieties about their physical well-being to the detriment of the older girls. The father, who is invested in proving that plaintiff is a negligent and inferior parent, has conveyed his criticism of plaintiff to the

children and to the professionals with whom the parties interact.

The evidence adduced at trial demonstrates that the mother is more suited to be the custodial parent. The forensic examiner, Dr. Kaplan's testimony supports plaintiff's position that until shortly before this litigation was commenced she was the children's primary caretaker, an arrangement that was pleasing to both parties until the marriage deteriorated. In addition, the evidence reveals that her parenting skills are more natural and that she easily encourages the children's development.

In considering the best interest of the children in light of the aforementioned factors, it is clear to the court that the acrimony between the parties makes joint custody an unrealistic option. In the *Braiman* case noted above, the Court of Appeals held that joint custody arrangements are imposed only "as a voluntary alternative for relatively stable, amicable parents behaving in a mature fashion." *Braiman v. Braiman*, 44 NY2d 584 (1978). The parents in this case do not communicate. Their hostility to one another is palpable. The consequence of their failure to communicate results in additional tension for the children. It unnecessarily delays decisions affecting the children's education and extra-curricular activities, and it results in contradictory decisions about medical concerns. Moreover, when an issue such as a conflict about school or camp has arisen, neither party has been willing to accommodate, or even listen to, the other's objection. Accordingly, although the

parties may someday be able to co-parent, that is not presently true. The court finds that joint custody is inappropriate.

Accordingly, the plaintiff's application for sole custody of the children is granted. She shall be the residential custodial parent subject to the access schedule discussed below. In addition, plaintiff shall be awarded legal custody of the children and shall have the authority to make all of the major decisions with regard to their education, extra-curricular and camp activities, religious observation and medical needs. Each parent may make day-to-day decisions that might arise during their parental time with the children, but in so doing neither shall be permitted to intentionally undermine the other.

Plaintiff shall not make any major decisions concerning the children without first consulting defendant sufficiently in advance of making the decision to enable him the opportunity to offer timely suggestions and opinions. The plaintiff shall consider the defendant's suggestions and shall respond to them in writing prior to making a final decision. If the parents are incapable of discussing the issues, they are encouraged to use email, but an exchange of information is required before a decision is made. Additionally, both parents have indicated that they would encourage the mediation services of a third person to assist in the decision making process. Although, I cannot order the parties to engage a mediator or parent coordinator, I note that resorting to one has been valuable in the past and that it may be a positive avenue for the parties to pursue.

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*Access*

Pursuant to a stipulation, following the parties' physical separation they have temporarily shared physical custody of the children on a 50/50 schedule. Dr. Kaplan and the law guardian both concluded that this arrangement has added stress for the children, and that continuation of it is not in their best interests. According to Dr. Kaplan, the stress is related, in part, to the fact that each of the parties has competed to be the more capable parent during this period, thereby creating an unnatural environment. In addition, the fact that the parents have different parenting styles and disagree about every aspect of child rearing has added to the stress and now warrants a change in this schedule. Under the prevailing circumstances, the plaintiff is quite right when she states that the children need one home base.

In the present case both parents have submitted proposed parenting schedules which I have taken into consideration in determining what I believe to be the best resolution for the children. Because the parties' references to religious observation includes dates on the Hebrew calendar as well as the secular calendar, a clarification is noted at the beginning of the discussion of schedules. That is, all dates and years specified in this order refer to the secular calendar.

The children shall reside with their mother on weekdays, and shall spend alternate weekends with each parent. The weekend schedule shall begin with pick up

from school on Friday and shall end when they shall be delivered to school on Monday morning. The children will spend every. Thursday night with their father, beginning with pick up from school on Thursday. The father shall take them to school on Friday. In the event that the father is unable to avail himself of the scheduled week day/weekend parenting time due to a professional conflict, he shall notify the mother sufficiently in advance to allow her to make appropriate arrangements for the children. The father shall be permitted make up time for a portion of the lost time at a time that is convenient to both parents. In addition, the parents may adjust the at weekend schedule by mutual agreement to accommodate each other's schedule.

When transfers from one parent to the other occur on a school day, the parent who is scheduled to pick up the children on that day assumes responsibility for them at 9:00 a.m. If a sick child needs to stay home from school, the parent due to pick up the children from school must take care of the sick child starting at 9:00 a.m., unless there is a compelling medical reason not to move the child or the parents agree to alternate arrangements. Each parent may delegate pick up and child care of the children to appropriate caregivers.

The secular holidays, which shall include Thanksgiving, New Years Eve, Martin Luther King Day, July 4th and Labor Day shall be alternated as follows: In odd-numbered years Roy Lubit shall have Thanksgiving with the children starting from after school on the Wednesday immediately before

Thanksgiving day and ending 5:00 p.m. on Sunday evening following the holiday. In even numbered years, Elana Lubit shall spend this time with the children. In even numbered years, Roy Lubit shall spend New Year's Eve with the children and Elana shall have the holiday with them in the odd numbered years. The children shall spend Martin Luther King Day and July 4th with Roy Lubit in odd numbered years and with Elana Lubit in even numbered years. The children will spend Labor Day with Elana Lubit in odd numbered years and with Roy Lubit on even numbered years. Any adjustments that are required to the weekly calendar to accommodate holiday schedules must be made at least eleven weeks before the holiday in order to permit plaintiff to plan her work schedule.

Jewish holidays shall include, *inter alia,* Rosh Hashanah (two nights). Yom Kippur (two nights), Succoth (two nights) Simchat Torah (one night), Chanukah (eight nights), Purim (one night), Passover (two nights) Shavuot (two nights). The parties shall share the holidays as close to evenly as possible. On the odd numbered years, Roy Lubit shall spend Yom Kippur, Simchat Torah, the first four nights of Chanukah, Purim and Passover with the children, and Elana Lubit shall spend Rosh Hashanah, Succoth, the last four nights of Chanukah, and Shavuot with them. The reverse shall be true on even numbered years. No special arrangements shall be made for any other Jewish holidays. To the extent that the parents may have made other plans for the secular year 2007, that agreement shall remain in effect and the instant schedule shall

commence in the calendar year 2008. Additionally, if the parties agree to a holiday schedule that is more suited to their *mutual desire,* they may adjust the schedule in a writing without resort to the court. The Jewish holiday schedule shall take precedence over the weekly access schedule.

The school the children attend has three extended breaks during the academic year. They shall be divided as close to evenly as possible. In odd numbered years, Elana Lubit shall spend the first six nights of the winter (December) break with the children. Roy Lubit shall spend the remainder of the holiday with, them. This schedule shall be reversed in the even numbered years. In even numbered years, Roy Lubit shall spend the first six nights of the February break with the children. Elana Lubit shall spend the remainder of the holiday with them. This schedule shall be reversed in odd numbered years. In even numbered years, Elana Lubit will have the first week of the Passover break, which includes both Seder nights of the holiday with the children. Roy Lubit shall have the second week of the holiday with them. The schedule shall be reversed on odd numbered years.

The children have attended day camp during the summer for eight weeks, and are expected to continue to do so in the future. The remainder of the summer vacation shall be shared evenly between the parents. Each of the parents shall have a two-week vacation period with the children. In the odd numbered years, the father shall have a two-week vacation period with the children prior to the commencement of camp and

the mother shall have a two-week vacation during the two weeks after camp. The reverse vacation schedule will be in effect on even numbered years. If the summer break does not have precisely four weeks in addition to the eight weeks of camp, the parties shall share the non-camp period evenly.

Responsibility for planning and hosting the children's class birthday parties will alternate. As is true of all other division of holiday parenting time, the schedule will alternate each year to provide each of the parents with as close to equal time with each of the children at her school birthday celebration. In odd numbered years, Roy Lubit shall host Talia and Rina's class birthday parties and Elana Lubit shall host Lia's party. In even numbered years, that arrangement shall be reversed. When one parent hosts the party, the other parent will bring the cake and light the birthday candles. Each parent will have the opportunity to celebrate his/her own birthday with the children on its actual date. If that should occur on the other parent's access time, a make-up date shall be arranged sufficiently in advance to accommodate the other's schedule. The same is true for other's day and father's day if the parents wish to celebrate his or her day with the children.

Although the mother wishes to create a schedule and set the parameters for the girls' Bat Mitzvahs now, it is too far in advance to put any arrangement into an order. The oldest child is eight years old. There are too many intervening years between now and the first celebration for a court order to be able to anticipate

events that may impact on a Bat Mitzvah for a reasonable order to be established. Perhaps over time, the parties will be able to make such personal arrangements without court intervention,

The parents will both respect the other's parenting time. Neither will intrude when the children are with the other parent. The non-custodial parent may have one daily telephone call, of reasonable length, with the children during the other's parenting time. Upon written agreement, the parties may adjust any aspect of the schedule to something more suitable to their needs.

*Child Support*

Payment of child support is governed by the Child Support Standards Act ("CSSA") which requires that a percentage of the basic cost of raising a child be paid by the non-custodial parent to the custodial parent. DRL §240 1-b(a). Child support is based upon each parent's ability to pay, not necessarily the parent's income. *K. v. B.*, 13 AD3d 12 (1st Dept. 2004); *Matter of Zwick v. Kulhan,* 226 AD2d 734 (2nd Dept. 1996). Under appropriate circumstances the court may impute to a party his earning potential rather than his current income. DRL §240 1-b(b)(5)(iv); *Fruchter v. Fruchter,* 29 AD3d 942 (2nd Dept 2006).

In a family such as this with three children, child support consists of twenty-nine percent of the combined parental income up to eighty-thousand dollars. Such an

amount shall be prorated in the same proportion as each parent's income is to the combined parental income. DRL § 240 1-b (c). If the combined parental income exceeds $80,000, the court shall determine the amount of child support for the amount of combined parental income in excess of such dollar amount through consideration of such factors as: the financial resources of each parent, the physical and emotional health of the children and his/her special needs, the standard of living the child would have enjoyed had the marriage not been dissolved; the tax consequences to the parties; the non-monetary contributions that each parent will make toward the care and well-being of the child and other factors the court may think are relevant to the case.

Plaintiff is the custodial parent for the purposes of child support. The parents are medical doctors with a combined annual income that exceeds $300,000. Plaintiff is a salaried employee who earned a gross income of $211,286 in 2006, and defendant is a self-employed psychiatrist who earned $127,000 that year. These figures fail to take into account the fact that defendant chose to adhere to a reduced work schedule during the pendency of this litigation for the ostensible reason that he wanted to spend more time with his children than he previously had.

Plaintiff claims that as a board-certified psychiatrist practicing a full time schedule in New York City, as he did prior to commencement of this action, defendant's income would be substantially higher. In this regard, she has offered the rebuttal testimony of John. Chase,

a former client and one-time friend of defendant. Mr. Chase testified that defendant revealed that he intended to artificially reduce his income to minimize the child support obligations that would be imposed at the conclusion of this litigation. Because Mr. Chase's testimony may be colored by separate litigation in which defendant seeks money damages from him, I give it little weight.

It does appear that an income of $150,000 should reasonably be attributed to defendant who conceded that he voluntarily reduced his workload when the marriage deteriorated. Defendant's now claims that his income was involuntarily reduced when plaintiff sought an Order of Protection against him, claiming that the Supreme Court in New York Comity ceased appointing him to be a forensic examiner in custody cases. He failed to substantial to this allegation with probative evidence of the number of appointments he received prior and subsequent to plaintiffs application seeking an order of protection. Accordingly, I conclude that defendant's reported income of $127,000 is less than it would be due to his voluntary red action of his work week, and I impute an income of $150,000 to him for the purpose of determining his child support obligations. Thus, by assuming that defendant's income could reasonably be $150,000 annually, and considering the actual, income information provided to the court, I conclude that the parent's combined income is approximately $360,000, of which plaintiff's portion is 60% and defendant's is 40%.

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Twenty-nine percent of the combined parental income up to $80,000 is $23,200. Pursuant to the CSSA, defendant's proportionate share is $9,280 per year or $773.33 each month. In this case, taking the parties' total income into consideration, the equitable distribution of the parties' assets, the children's needs and the parties' life style, it is appropriate for the court to apply the CSSA guideline percentage of 29% to $100,000 in combined parental income in excess of the mandatory $80,000 totaling $180,000. Defendant's proportionate share (40%) of the additional child support obligation of $100,000 combined parental income would amount to $11,600 annually or, $966,67 monthly. Therefore, defendant's total basic child support obligation is $1,740 per month. Defendant's child support obligations shall be reduced in accordance with the CSSA guidelines as each child is emancipated or completes a four-year college program.

With respect to add-on expenses, the parties shall share them in the same proportion as they share basic child support, with, sixty percent paid by plaintiff and forty percent paid by defendant. Add-on expenses shall include un-reimbursed medical expenses, child care expenses, educational costs including private school and college, as well as camp and extra-curricular expenses. Payment shall be made to plaintiff within thirty days after presentation to defendant of copies of bills for these expenses.

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*Equitable Distribution*

The parties waived equitable distribution in a prenuptial agreement executed on September 1, 1996 (Plaintiff's Ex. 13). Article I of the agreement provides that if the marriage is dissolved by legal proceedings, jointly held assets shall be divided equally, regardless of who furnished the funds to purchase the jointly held property. The parties own a cooperative apartment situated at 165 West End Avenue, unit 3-K, New York, New York. It, and a Fidelity brokerage account, are the only jointly held assets relevant to this decision[4]. At the request of the parties, East Coast Appraisal Service inspected the apartment and stated its value to be $830,000 as of December 14, 2005 (See Court's Ex. II). The outstanding mortgage balance at the commencement of trial was $308,362, Equity in the apartment is $521,637, of which each of the parties is entitled to half.

Defendant-father wishes to continue to live in the marital apartment after the conclusion of this action. He seeks a judgment allowing him to pay plaintiff her share of its value when the youngest child reaches the age of 21 years. In the alternative, defendant asks to be permitted to purchase plaintiff's share of the apartment over an unspecified period of time, without interest, so that he can retain the marital home which is near the

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4. After commencement of this action, defendant purchased a studio apartment which is adjacent to the marital residence. There is no dispute that it is his separate property.

children's "school, activities, therapists and friends." Without offering testimony of his assets, defendant claims that unless he is given an extended period in which to pay plaintiff for her share of the apartment, he will not be able to remain in it.

A custodial parent may be awarded sole use and occupancy of a marital residence during the children's minority "without regard to the form of ownership such the property." *Goldblum v. Goldblum*, 301 AD2d 567 (2nd Dept. 2003). In such a case, the court weighs the financial need of the parties against the need of the custodial parent to occupy the marital residence. Using this analysis, the court declines to exercise its discretion to allow defendant to defer paying plaintiff her equitable distribution of half of the value of the apartment until the children reach their majority, or even over an extended time without paying interest. The court is not persuaded that defendant is unable to pay plaintiff and also remain in the apartment. The Schedule of Assets and Liabilities of Roy H. Lubit appended to the prenuptial agreement in evidence reveals that defendant has separate property that could be utilized to help pay plaintiff her equitable share of the value of the apartment. In addition, he is in a position to utilize the proceeds of the sale of the studio apartment that he recently purchased to pay plaintiff a portion of the money due to her, in order to remain in the marital residence. Finally, as defendant will not be the custodial parent of the children following entry of judgment, the equities do not lie in his favor.

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The value of the marital residence shall be divided equally between the parties. If defendant wishes to remain in the apartment, he shall have 120 days from the date of this decision in which to pay plaintiff her 50% share. If defendant chooses not to keep the apartment, it shall be sold and the proceeds of the sale shall be equally divided after paying taxes, closing costs and giving credit, if any is due to the party who has made mortgage payments during the pendency of the litigation.

The parties jointly hold a Fidelity Investments brokerage account which had an approximate value of $19,000 at commencement of trial. They shall share the current value of the account equally.

*Imposition of Sanctions*

Plaintiff seeks economic sanctions in the form of a money judgment against defendant due to his alleged refusal to remove all barriers to her remarriage. The parties were married by a Rabbi in a Jewish religious ceremony. Unless defendant provides her with a religious divorce known as a Get she will be precluded from remarrying in a Jewish religious ceremony. It is her position that defendant told her after commencement of this action that he will never provide her with a Get.

A Jewish religious divorce is more readily obtainable by a husband than a wife *Golding v. Golding*, 176 AD2d 20 (1st Dept. 1992); *Matter of Rubin v. Rubin*, 75 Misc.d

776 (Fam Ct Bronx County, 1973). In an attempt to redress the problem created when a Jewish husband refuses to provide his wife with a Get, the legislature enacted DRL §253 which permits a court to withhold a final judgment of divorce to a plaintiff husband who refuses to provide a Get to his wife. A separate section authorizes a court, where appropriate, to "consider the effect of a barrier to remarriage" when determining equitable distribution, and to fashion a remedy. DRL § 236 (B)(5)(h). The remedy plaintiff seeks is an equitable adjustment of the proceeds of the value of the marital residence. Under the prevailing circumstances this prayer for relief is premature.

Defendant testified that be will provide plaintiff with a Get at the conclusion of trial. There is presently no reason to believe that defendant will not honor his commitment. Consequently, the defendant shall be given a period of 30 days from the date of this decision and order in which to provide the plaintiff with a Get. Should defendant fail to take all steps necessary to remove the barriers to plaintiff's remarriage during the 30-day period, plaintiff may move the court for equitable relief in the form of economic sanctions. Accordingly, this branch of plaintiff's prayer for relief is premature and is denied without prejudice.

Any additional issues raised in post-trial memoranda have been considered and are denied.

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**Conclusion**

The court having examined all of the factors relative to a determination of child custody, access, equitable distribution, child support and sanctions, it is

ORDERED that plaintiff is awarded physical custody of the minor children of the marriage, and it is further

ORDERED that plaintiff is awarded legal custody of the children of the marriage, and it is further

ORDERED that the parties shall share parenting time in the manner stated above, and it is further

ORDERED that the parties shall share the value of the marital apartment and the Fidelity brokerage account equally, and it is further

ORDERED that if defendant remains in the marital apartment he will pay plaintiff her equitable share of its value within 120 days of the date of this order, and plaintiff shall simultaneously execute all documents necessary to transfer ownership to defendant's name, and it is further

ORDERED that defendant shall be required to pay plaintiff monthly basic child support in the amount of $1,740, and it is further

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ORDERED that defendant shall be required to pay plaintiff 40% of the add-on expenses for un-reimbursed medical expenses, child care costs, educational expenses including private school tuition and college, extra-curricular and camp expenses, and it is further.

ORDERED that plaintiff's application for sanctions is denied without prejudice to renewal should defendant fail to provide her with a GET within 30 days of this decision and order.

This constitutes the decision and order of the court. Plaintiff shall settle judgment on notice within sixty days.

Dated: New York, New York
June 15, 2007

s/ Saralee Evans
Saralee Evans, JSC
HON. SARALEE EVANS

## APPENDIX C — MOTION OF THE COURT OF APPEALS OF NEW YORK DENYING LEAVE TO APPEAL FILED JANUARY 14, 2010

**COURT OF APPEALS OF NEW YORK**

**No. 2009-1247.**

**ELANA B. LUBIT,**

**Respondent,**

**v.**

**ROY H. LUBIT,**

**Appellant.**

Jan. 14, 2010.

Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

No. 09-1252

IN THE

# Supreme Court of the United States

ROY H. LUBIT,

*Petitioner,*

*v.*

ELANA B. LUBIT,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the procedure utilized to determine a child custody dispute between parents in a state court divorce action in (i) appointing a forensic child psychiatrist to make an assessment concerning custody and to submit his findings concerning the parties' relative parenting abilities to the court and (ii) determining the children's "best interests" after a trial by a "preponderance of the evidence" comports with the Due Process Clause of the Fourteenth Amendment.

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## INTRODUCTION

Petitioner (the father of three minor children) seeks a writ of certiorari to review the determination of an award of custody to Respondent (the children's mother) that was made in a state court divorce action. In accordance with New York law, the New York Supreme Court: appointed independent counsel for the children; appointed a forensic child psychiatrist to conduct an assessment and to submit findings to the court; conducted a trial; determined the children's "best interests" by a preponderance of the evidence in written decision; and awarded custody of the parties' children to Respondent and specified visitation to Petitioner. [Pet. 16-17, 5a-34a]

Petitioner asserts that the above procedure violated his constitutional right to due process and then presents a variety of reasons in an effort to support this claim. However, notwithstanding the various rationales he presents, Petitioner fails to set forth any basis under existing law for his contentions. In reality, Petitioner is simply a disgruntled litigant, whose claims for custody were repeatedly rejected in the state courts based on factual findings with which he disagrees.

Thus, Petitioner does no more than advance contrived claims of constitutional error, which demonstrate his unrelenting "inflexib[ility] in . . . response to the children's needs"[1] and his persistence in continuing to challenge a settled custody

[1] A finding made with respect to Petitioner by the forensic child psychiatrist. [Pet. 3a]

determination in this Court, the litigation for which started almost six years ago. To be sure, Petitioner raises no issues that require this Court's review, and the petition for a writ of certiorari should be denied.

## REASONS FOR DENYING THE PETITION

### A. *Alleged Constitutional Violations*

The procedures employed below in determining the parties' disputed claims for custody comported with long-standing New York law and were fair in every respect. The trial court properly accorded the children party status, and they were represented by court-assigned independent counsel. 22 NYCRR § 7.2. The trial court properly appointed a forensic child psychiatrist to conduct an assessment and to submit findings with regard to the parties' relative parenting capacities. *Kesseler v. Kesseler*, 10 N.Y.2d 445, 225 N.Y.S.2d 1, 180 N.E.2d 402 (1962). A trial was conducted at which all parties (including Petitioner and the children) were accorded an opportunity to offer evidence, to cross-examine witnesses, and otherwise to be heard. *See Lincoln v. Lincoln*, 24 N.Y.2d 270, 299 N.Y.S.2d 842, 247 N.E.2d 659 (1969). Following the trial, the court properly received post-trial written memoranda from the parties and then issued a written decision. N.Y. CPLR §§ 4016, 4213. The court's determination was based on the children's "best interests." N.Y. Domestic Relations Law § 249(1)(a). As is the case in civil actions in general, the court's findings and conclusions concerning the children's "best interests" were based on a "preponderance of the evidence." *See, e.g., Karcher v. Byrnes*, 232 A.D.2d 760,

761, 649 N.Y.S.2d 484, 485 (3rd Dept.1996). Finally, Petitioner obtained review of the trial court's determination on direct appeal in the New York Supreme Court, Appellate Division, First Department. N.Y. CPLR § 5701(a).

As summarized by the commentators:

> Procedural due process is a guarantee of [a] fair procedure. While due process of law, in its procedural aspect, has never been a term of fixed and invariable content, the essential elements of procedural due process of law are notice and the opportunity to be heard prior to depriving a person of his or her protected property [or liberty] interest. Thus, procedural due process [requires] . . . notice of the proceedings[,] . . . an opportunity to [be heard], that is, a hearing, before an impartial tribunal having jurisdiction of the cause[,] . . .and the . . . deprivation, under the circumstances presented, must be resolved in a manner consistent with essential fairness. The determination of the appropriate form of procedural protection required under the Due Process Clause requires an evaluation of all the circumstances and an accommodation of competing interests, in which an individual's right to fairness must be respected, as must a court's need to act quickly and decisively.
>
> The Due Process Clause calls for two separate inquiries in evaluating an alleged procedural due process violation: has [a party] lost

> something that fits into one of the three protected categories of life, liberty, or property; and, if so, has the [party] received the minimum measure of procedural protection warranted under the circumstances. . . .
>
> The idea of procedural due process is reflected in the statement that it is a rule as old as the law that no one will be personally bound until he or she has had a day in court. . . .
>
> Though the primary function of legal process is to minimize the risk of erroneous decisions, the Due Process Clause does not mandate that all governmental decision making comply with standards that assure perfect, error-free determinations. Thus, procedural due process protection does not prescribe or require a failsafe process that totally precludes any possibility of error.

16B Am. Jur. 2d Constitutional Law § 955.

The procedures employed in deciding custody of the parties' children were entirely consistent with the above standards. Petitioner's assertions to the contrary are without merit. Specifically:

1. Petitioner contends that the trial court was somehow "biased" against him. These claims were rejected below. Petitioner does not – and never did – state any "objective" basis for this claim. As such,

Petitioner does not state a due process violation based on the alleged "bias" of the trial court, as a matter of law. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2265 (2009).

2. Petitioner asserts that the appointment of a forensic child psychiatrist to conduct an assessment and to testify at the trial somehow violated his right to due process. The testimony of the child psychiatrist was "primarily based upon on direct knowledge derived from [his] psychiatric interviews of the parties and their children, alone and in combination." [Pet. 3a] However, Petitioner complains that the child psychiatrist was permitted to rely, in part, on hearsay data, even though it is of a type reasonably relied upon by experts in the field in forming opinions or inferences. [Pet. 16a] As detailed below, Petitioner's claim that this procedure was somehow unconstitutional is devoid of merit.

It is well-established under both state and federal law that, in a civil action, a properly qualified expert may provide opinion testimony based, in part, on hearsay data "reasonably relied upon by experts in the particular field." *E.g.*, Fed. R. Evid. 703; *Hambsch v. N.Y. City Transit Auth.*, 63 N.Y.2d 723, 726, 480 N.Y.S.2d 195, 197, 469 N.E.2d 516, 518 (1984). Notably, such hearsay data is admissible for a limited purpose, i.e., not for the truth of the matter asserted, but rather only to establish a part of the basis for the expert's opinion. *Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 717 (6th Cir. 1999); *People v. Campbell*, 197 A.D.2d 930, 932, 602 N.Y.S.2d 282, 284 (4th Dept. 1993). In any event, "the due process clause does not place a per se prohibition on the use of hearsay evidence." *Costa v. Fall River Hous. Auth.*, 453

Mass. 614, 625, 903 N.E.2d 1098, 1109 (2009). In another context, this Court has discussed the intersection of hearsay and procedural due process:

> Hearsay rules . . . similarly prohibit the introduction of testimony which, though unquestionably relevant, is deemed insufficiently reliable. Of course, to say that the right to introduce relevant evidence is not absolute is not to say that the Due Process Clause places no limits upon restriction of that right. But it is to say that the defendant asserting such a limit must sustain the usual heavy burden that a due process claim entails. . . .

*Montana v. Egelhoff*, 518 U.S. 37, 42-43 (1996) (plurality opinion) (citation and footnote omitted).

Here, the trial court ruled the testimony of the forensic child psychiatrist admissible. [Pet. 19a-20a] The admissibility of the child psychiatrist's testimony was expressly upheld on appeal. [Pet. 3a] There was nothing about the trial court's appointment of this expert and admission of his testimony at the trial that violated Petitioner's due process rights.

3. Petitioner also contends that the state courts violated his right to due process by employing a "best interests of the child" standard in determining to award custody to Respondent. Petitioner alleges that this standard is unconstitutionally vague. [Pet. 3] This contention should be rejected out of hand.

Contrary to Sup. Ct. Rule 14(1)(g)(i), Petitioner does not set forth in his petition "where in the court of first instance[ ] and in the appellate courts . . . [this] federal question[ ] [was] . . . raised[,]" and, in fact, the issue is not preserved. Regardless, this Court emphasized in *Reno v. Flores*, 507 U.S. 292, 303-04 (1993), that "'[t]he best interests of the child,' a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody." There is nothing unconstitutional about this standard in the context of the present case under existing and well-established law. *See id.*

Notably, Petitioner does not reference *Reno* or even attempt to explain why this relatively recent Supreme Court precedent should now be jettisoned as a matter of constitutional law. *See Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 875, 912-13 (2010) ("Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.").

4. Finally, Petitioner maintains that his right to due process was violated because the state courts utilized a "preponderance of the evidence" standard in deciding the children's best interests. According to Petitioner, the state courts should have applied the higher "clear and convincing evidence" standard that is constitutionally mandated in proceedings brought by a state to terminate parental rights and free a child for adoption. *See Santosky v. Kramer*, 454 U.S. 745 (1982).

Here again, Petitioner does not state where this issue was raised below. This is because it was not raised below. Nevertheless, the application of the "preponderance of the evidence" standard in a simple custody dispute between parents is plainly constitutional.

> Thus, while the parties may be intensely interested in a civil dispute [such as one concerning custody], application of a fair preponderance of the evidence standard indicates both society's [lesser] concern with the outcome [in a civil dispute between two private parties who stand on an equal footing], and a conclusion that the litigants [in such a dispute] should share the risk of error in roughly equal fashion.

*Santosky v. Kramer*, 454 U.S. at 755 (citations and internal quotations marks omitted).

It is only because of the more substantial constitutional interests at issue and the potential level of state interference with those interests in a proceeding to terminate parental rights concerning a dependent, neglected or abused child that the state is compelled to prove its allegations against a parent by "clear and convincing evidence." *Id.*; *see also Alsager v. District Court of Polk County, Iowa*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976) (per curiam); *cf. In re Winship*, 397 U.S. 358 (1970) (applying the "beyond a reasonable doubt" standard in juvenile delinquency proceedings because personal freedom is at stake).

Given the private nature of the present dispute between two parents, there was nothing constitutionally unsound in deciding custody of the parties' children by a "preponderance of the evidence."

B. ***Jurisdiction***

As stated, the state trial court accorded the children party status and assigned them independent counsel. In fact, the attorney for the children participated in all aspects of the trial and appellate proceedings below.

A petition for a writ of certiorari must be timely served "on each . . . party separately represented in the proceeding." Sup. Ct. Rule 29. Notwithstanding this mandate, Petitioner did not serve the children's attorney with the present petition, and the time to do so has now expired. Sup. Ct. Rule 13. Accordingly, this Court is precluded from making any determination whatsoever involving the children and their custody. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 89 (1946) (stressing that when specified parties in proceedings below "have not been named as respondents here or served [as mandated by applicable rules]," the Supreme Court is "precluded from making any determination concerning their rights or liabilities").

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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